

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

THORNBURY NOBLE, LTD.

v.

THORNBURY TOWNSHIP, et al.

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CIVIL ACTION
No. 99-6460

O'Neill, J.

September , 2000

MEMORANDUM

Presently before me is defendants' motion to dismiss the complaint on a variety of grounds. For the reasons stated below, the motion will be denied in part and granted in part.

I.

For the purposes of this motion, I assume that the well-plead factual allegations in the complaint are true.

Plaintiff Thornbury Noble, Ltd. owns a property known as "Thornbury Commons" at the intersection of Routes 926 and 202 in Thornbury Township, Pennsylvania. Complaint ¶ 13. In March 1995, plaintiff received approval for a zoning and site plan for that property from defendant Thornbury Township Board of Supervisors (the "Board"). Id. ¶ 14. The plan called for an "L-shaped," strip-style building. Id. ¶ 15.

In November 1997, plaintiff sought to change the approved plan for Thornbury Commons to allow for a 50,000 square foot supermarket. Id. ¶ 16-18. The revised plan was taken before the Board on July 7, 1998. Id. ¶ 37-42. At that meeting, two of the Board members requested a

“contribution” from plaintiff in order to “compensate” the Township for the loss of residential zoning. Id. ¶ 41. Plaintiff declined to make such a contribution unless specifically authorized by ordinance. Id. ¶ 42, Exhibit F. One of the Board members responded that such contributions had previously been made to the Township “voluntarily.” Id. Plaintiff continued to decline to make such a contribution because it believed such a payment would constitute “contract zoning” in violation of the Pennsylvania Municipalities Planning Code.¹ In November 1998, the Board rejected plaintiff’s plans for a supermarket at Thornbury Commons. Id. ¶ 48.

Plaintiff further alleges that while the Board was considering its plans for a supermarket, R.J. Waters Associates, a second developer, was also pursuing plans for a supermarket at a second site in the Township. Id. ¶ 22. In that instance, Waters agreed to make a contribution of \$600,000 to the Township in exchange for the rezoning that was necessary to build the supermarket. Id. ¶ 31. Plaintiff claims that the Board thereafter stopped considering its zoning requests on the merits in an effort to promote the Waters project. In support of this contention, plaintiff points to correspondence from one of the Board members which states: “One key issue is not having this [the concerns of an adjacent property owner about the Waters plan] slow down the Waters’ project since we want them to be able to lay the first brick and assure their supermarket will be the next one built to enable our funding for the next phase of the Dallet tract acquisition effort.” Id. ¶ 33, Exhibit E. The plan for the Waters’ project was approved at the

¹ The MPC states that: “No municipality shall have the power to require as a condition for approval of a land development or subdivision application the construction, dedication or payment of any offsite improvements or capital expenditures of any nature whatsoever or impose any contribution in lieu thereof, exaction fee, or any connection, tapping or similar fee except as may be specifically authorized under this act.” 53 Pa.C.S.A. § 10503-A(a). In Count II, plaintiff contends that this solicitation of a “voluntary contribution” violated this provision of the MPC.

same meeting where the Board rejected the plan for plaintiff's project. Id. ¶¶ 48-49.

II.

In Count I, plaintiff alleges that defendants violated its substantive due process rights. Defendants' motion to dismiss this Count will be denied.

As a general matter, "federal courts are reluctant to sit as appeal boards for disputes between land developers and a Township's planning body." Woodwind Estates, Ltd. v. W.J. Gretkowski, 205 F.3d 118, 122 (3d Cir. 2000). Nonetheless, developers have a due process right to be free from "arbitrary and irrational zoning actions." Arlington Heights v. Metropolitan Housing Corp., 429 U.S. 252, 263 (1977); see also Bello v. Walker, 840 F.2d 1124, 1129 (3d Cir. 1988) (a zoning action violates due process if it is "arbitrary, irrational, or tainted by improper motive"). This due process protection includes the right to be free from governmental decisions made for improper economic motives. See Parkway Garage, Inc. v. City of Philadelphia, 5 F.3d 685, 695 (3d Cir. 1993) (reversing the grant of a Rule 50 motion because jury could have reasonably concluded that City closed parking garage for an "improper economic motive" – namely, "the garage had considerably more value to the City if it could relieve itself of the Parkway lease").

Plaintiff argues that the Board's rejection of its plan for a supermarket at Thornbury Commons violated this substantive due process right because: 1) consideration of its plan was made contingent upon its making a contribution to the Township that is allegedly illegal under state law; and 2) its plan was rejected in order to give an unfair advantage to another developer who had agreed to make such a payment. Defendants implicitly concede that if these allegations

were proven a reasonable person could conclude that the Board acted with an improper motive. Defendants argue, however, that plaintiff can succeed with its claim “only if the [Board] could have had no legitimate reason for its decision.” Pace Resources, Inc. v. Shrewsbury Township, 808 F.2d 1023, 1034 (3d Cir. 1987). Defendants further argue that the same documents plaintiff relies upon to create an inference of improper motive also state legitimate justifications for the Board’s action. For example, the minutes of the July 7, 1998 Board meeting show that one of the members commented that “many residents are opposed to converting [the zoning at Thornbury Commons] from residential to commercial.” See Complaint, Exhibit F at 2. Defendants believe that this evidence of competing motivations requires dismissal of this Count.

Defendants misconstrue plaintiff’s burden. Pace did state in passing that “federal judicial interference with a state zoning board’s quasi-legislative decisions . . . is proper only if the governmental body could have had no legitimate reason for its decision.” Pace, 808 F.2d at 1034. However, the court’s analysis of the complaint in that case was not as deferential to the Township as that one sentence would seem to imply. In holding that the complaint failed to state a claim for a substantive due process violation, the Pace Court emphasized that a plaintiff need only “allege facts that would support a finding of arbitrary or irrational legislative action by the Township.” Id. at 1035. In that case, the complaint failed to do so because it contained only “conclusory pleadings” that “fail[ed] to make any factual allegations that indicate irrationality.” Id. (emphasis added). However, the Pace Court did not address the situation where, as in this case, the complaint contains specific factual allegations of improper motive but also provides benign alternative explanations for the questioned actions.

The Court of Appeals did, however, address a similar situation in Bello. In that case, the

District Court entered summary judgment against a developer who claimed that municipal officials had improperly denied building permits. Bello, 840 F.2d at 1126-27. Plaintiffs claimed that the permits were denied “for partisan political or personal reasons unrelated to the merits of the application for the permits.” Id. at 1129. Defendants presented “an arguably rational ground” for the denials; namely, “plaintiffs’ failure to build in numerical sequence.” Id. at 1130. The Court of Appeals contrasted this situation with the facts in Pace and concluded that “it is the factfinders’ role to resolve this factual dispute.” Id. On this basis, the summary judgment was reversed. See also Woodwind Estates, 205 F.3d at 125 (reversing the grant of a Rule 50 motion because evidence presented at trial “could provide a jury with a basis from which it could reasonably find that the decision of the defendants to deny approval [for a low-income housing subdivision plan] was made in bad faith or was based upon an improper motive”) (emphasis added).

The issue in Bello and Woodwind Estates was whether the plaintiffs had amassed sufficient evidence from which a reasonable jury could find improper motives. Here, on a motion to dismiss, plaintiff has a lesser burden. It need only allege facts which if proved would be sufficient to support a finding of improper motive. Plaintiff has met its burden.

III.

In Count II, plaintiff claims that defendants violated § 10503-A(a) of the Pennsylvania Municipalities Planning Code during the July 7, 1998 Board meeting when plaintiff was asked to make a “voluntary contribution” to “compensate” the Township for the loss of residential zoning. Defendants argue that the MPC claim is untimely because it was not filed within 30 days of the

Board's decision.

However, it is unclear whether there is a private cause of action under the MPC, and plaintiff concedes that it cannot point to "any case law that establishes a separate cause of action for a violation of the MPC." Plaintiff's Mem. at 15. Therefore, before reaching the statute of limitations issue I will Order the parties to brief the question of whether there is a private cause of action under the MPC.

IV.

In Count III, plaintiff claims that defendants effected a temporary regulatory taking of Thornbury Commons during the period in which the Board was considering the supermarket zoning plan. Defendants' motion to dismiss this Count will be granted.

The Fifth Amendment prohibits private property from "be[ing] taken for public use, without just compensation." Since Justice Holmes' opinion in Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 415 (1922), the Supreme Court has consistently held that "while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking." The Court has since "described at least two discreet categories of regulatory action" that are compensable as takings. Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1015 (1992). The first category comprises those regulations that "compel the property owner to suffer a physical 'invasion' of his property." Id. The second category comprises those regulations that "den[y] all economically beneficial or productive use of land." Id. Moreover, in First English Evangelical Lutheran Church of Glendale v. Los Angeles, 482 U.S. 304, 318 (1987), the Court recognized that a temporary regulatory taking is not "different in kind" from a permanent

depravation.

Since it is clear that plaintiff's property was never physically invaded, its taking claim can survive only if it can allege that it was denied "all use" of its property for the period of time in question. See Bello, 840 F.2d at 1130. It is not enough for plaintiff to allege that it was "merely denied a particular [] permit, [but] retained the right to put [its] land to a variety of alternative uses." Id. However, that is exactly what happened. Although plaintiff experienced delays in the Board's consideration of its plan for a supermarket, throughout that period plaintiff had approvals for its "L-shaped," strip mall plan. In fact, when the supermarket plan was finally rejected, plaintiff proceeded with that original plan. See Plaintiff's Mem. at 8. Although the supermarket plan may have been more profitable, plaintiff was not denied all economically beneficial use of its land. Therefore, there was no temporary taking and Count III will be dismissed.

V.

In Count IV, plaintiff asserts a state law claim for intentional interference with contractual relations. Defendants' motion to dismiss this Count will be granted as to defendants Thornbury Township and Thornbury Township Board of Supervisors but denied as to the individual Board members.

Defendants argue that this tort claim is barred by the immunity afforded to municipalities and their officials by the Political Subdivision Tort Claims Act. See 42 Pa.C.S.A. § 8541, et seq. Plaintiff concedes that the municipal defendants are immune from suit, but argues that the individual Board members are not immune from claims for intentional torts, including intentional

interference with contractual relations.

42 Pa.C.S.A. § 8550 provides that there is no immunity for municipal officials that cause injury through “a crime, actual fraud, actual malice or willful misconduct.” In Delate v. Kolle, 667 A.2d 1218, 1221 (Pa. Commw. 1995), the court applied that provision to a case arising from a zoning dispute and held that “the mere failure to reach the correct legal conclusion in a zoning case does not constitute the type of purposeful conduct which is necessary for a finding of willful misconduct [within the meaning of § 8550].” However, the court went on to note that in this context “willful misconduct” is synonymous with the term “intentional tort.” Id. Therefore, individual zoning board members could be held liable if they “intentionally reached the wrong decision knowing that it was wrong, acted from corrupt motives, or engaged in any other type of conduct which would demonstrate willful misconduct.” Id.

I therefore hold that if it were confronted with the issue the Pennsylvania Supreme Court would find that the intentional interference with contractual relations alleged here constituted willful misconduct within the meaning of § 8550 and Delate. On this basis, I will deny the motion to dismiss Count IV as to the individual Board members but grant it as to the municipal defendants.

An appropriate Order follows.

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ORDER

AND NOW, this day of September, 2000, after consideration of defendants' motion to dismiss, and plaintiff's response thereto, and for the reasons stated in the accompanying Memorandum, it is hereby ORDERED that:

1. Defendants' motion to dismiss Count I (substantive due process) is DENIED;
2. Defendants' motion to dismiss Count II (violation of the Pennsylvania MPC) is DENIED WITHOUT PREJUDICE subject to renewal within 20 days with appropriate briefing on whether there is a private cause of action under the Pennsylvania MPC. Plaintiff may respond 20 days thereafter;
3. Defendants' motion to dismiss Count III (temporary regulatory taking) is GRANTED;
4. Defendants' motion to dismiss Count IV (intentional interference with contractual relations) is GRANTED as to defendants Thornbury Township and Thornbury Township Board of Supervisors and DENIED as to the remaining defendants.

THOMAS N. O'NEILL, JR., J.